plaintiff failed to prove fraud, *McNett* v. *Cooper* (1882) 13 Fed. 586, or was guilty of laches, *Robinson* v. *Siple* (1895) 129 Mo. 208, or sought to avoid returning what he held, *Lee* v. *Vacuum Oil Co.* (1891) 126 N. Y. 579, or manifested an election to affirm, *Cobb* v. *Hatfield* (1871) 46 N. Y. 533, or had an adequate remedy at law. *Naugle* v. *Yerkes* (1898) 83 Ill. App. 310; s. c. (1900) 187 Ill. 358. Thus it would seem that in equity the *status quo* rule is rather an incident to, than a condition of, the relief, *Brown* v. *Norman* (1888) 65 Miss. 369, 377, is flexible to meet the equities of each case and concerns itself only with things actually received under the contract.

In a recent New York case, a divided court allowed a rescission of an insurance contract for fraud by the insured in its inception, by a cancellation of the policy, and a return of all the premiums or assessments paid with interest, without any deduction for the risk carried. *Moore* v. *Mutual etc. Ass'n* (1907) 106 N. Y. Supp. 255. The contract was performed on the part of the insured, by the payment of premiums, and performable as to the insurer, being on its part a promise to pay upon death. *Reed* v. *Provident Life Soc.* (N. Y. 1907) 82 N. E. 734. Before any loss has occurred the value of a policy consists in the prospect of the company performing its promise, and the insured simply enjoys an ability to enforce performance if there should be a loss. But the previous discussion shows that such value and corresponding benefit to the insured is not within the *status quo* rule, which is satisfied by a return of the policy. *Hedden* v. *Griffin* (1884) 136 Mass. 229; *Merino* v. *Ins. Co.* (1904) 21 Times L. R. 167; contra, under the civil law, *Angers* v. *Mutual Reserve Ass'n* (1904) 35 Can. Sup. Ct. 330, 337, opinion of Taschereau, C. J. Cases like the principal case must not be confused with recovery of premiums where the policy is absolutely void *ab initio, Fisher* v. *Ins. Co.* (1894) 160 Mass. 386; s. c. 162 id. 236, nor with so-called "rescission" for an anticipatory breach where some courts allow such a recovery as a measure of damages. *Mutual Reserve Ass'n* v. *Ferrenbach* (1906) 144 Fed. 342; *American Life Ins. Co.* v. *McAden* (1885) 109 Pa. St. 399; cf. *Toplitz* v. *Bauer* (1900) 161 N. Y. 325, 335.

Recovery of Money Received by Defendant from the Plaintiff's Debtor.—Where payment to the defendant by the plaintiff's debtor discharges the debtor's obligation to the plaintiff, the plaintiff may recover in quasi contract. *Webb* v. *Myers* (1892) 64 Hun. 11. Where the plaintiff's right is not so destroyed, it is no objection to recovery from the defendant that the plaintiff has a remedy against the debtor. *Johnson* v. *Collins* (1862) 14 Iowa 63. Unjust enrichment at the plaintiff's expense does not mean a necessary loss to the plaintiff if the remedy be denied him. The test is whether the defendant has received money which he is not equitably entitled to keep from the plaintiff. *Roberts* v. *Ely* (1889) 113 N. Y. 128. The unsatisfactory application of this rule in the decisions arises largely from the apparent reluctance of law courts to base their decisions squarely upon equitable grounds, and their endeavor to fortify their conclusions by the unnecessary and sometimes strained application of other principles. If the defendant has obtained the money fraudulently, recov-

ery is sometimes said to rest upon the plaintiff's "right to waive the tort." *Andrews* v. *Hawley* (1857) 26 L. J. Ex. 323. The tort, however, may be upon the third party only, as where an order is forged, and yet recovery is allowed in such cases. *Casey* v. *Pilkington* (N. Y. 1903) 83 App. Div. 91. From the standpoint of quasi contract such a case would seem identical with that of a stolen order. The tort to the plaintiff is merely an accidental circumstance. Recovery is allowed because the defendant has received money he is not equitably entitled to retain. *Hindmarch* v. *Hoffman* (1889) 127 Pa. St. 284. The waiver of the tort is the effect of the action, not the cause of action, as suggested in *Brown* v. *Brown, supra.* Still looser reasoning is found in a decision which holds that the plaintiff, by suing ratified the defendant's collection, thereby discharging the debtor's obligation and thus, deprived of his remedy against the debtor and put to expense, was entitled to recover. *Homire* v. *Rogers* (1888) 74 Ia. 395.

It is evident that the mere relationship of debtor and creditor between the third party and the plaintiff and between the defendant and the third party would not of itself be sufficient to permit a recovery. There must be some relation between the plaintiff and defendant arising from the facts of the case. It is sometimes expressed, inaccurately, in the rule that there must be privity, express or implied, between the plaintiff and defendant. It is probably this idea, aided by the tendency to find an analogy at law, that has led to the theory of the defendant's liability as agent. Keener, Quasi-Contracts, 167. While applicable only where the defendant has assumed to act as agent it is stretched beyond justification where the defendant has not intended to so act, *Lilly* v. *Hays* (1836) 5 Ad. & E. 548, even though he be considered as estopped by his fraud to deny that he acted as agent. *Brown* v. *Brown* (N. Y. 1886) 40 Hun. 418. The absurdity of implying this relationship has led some courts to deny relief where natural justice would seem to demand it. *Clarance* v. *Marshall* (1834) 2 Cr. & M. 495; *Vaughan* v. *Matthews* (1849) 13 Q. B. 187. Other cases require the express assent of the defendant to hold the money for the plaintiff. *Williams* v. *Everett* (1811) 14 East 582. This rule saves the defendant if he is a tortfeasor. Assent is implied from the taking of the money, *Farmer* v. *Russell* (1798) 1 B. & P. 296; *Hamlin* v. *Haight* (1873) 32 Wis. 237, the intention of the recipient being immaterial. *Siems* v. *Pierre Sav. Bank* (1895) 7 S. D. 338. An examination of the cases, with the equitable nature of the action, *Moses* v. *Macferlan* (1760) 2 Burr. 1005, in mind, leads, it is submitted, to the conclusion that where the defendant has received money from the debtor as a payment of the debtor's obligation to the plaintiff, the latter may recover upon the simple fundamental theory of natural justice. See *De Bernales* v. *Fuller* (1810) 14 East. 590, n; *Hall* v. *Marston* (1822) 17 Mass. 575; *Berry* v. *Mayhew* (N. Y. 1861) 1 Daly 54; *Chapman* v. *Forbes* (1890) 123 N. Y. 532; *Casey* v. *Pilkington, supra; Legard* v. *Gholson* (1852) 24 Miss. 691; *Allen* v. *Stenger* (1874) 74 Ill. 119. The intention by the debtor to pay the plaintiff's claim and the receipt of the money by the defendant constitute the necessary relation between the plaintiff and the defendant. And it would seem that this requirement was satisfied when the payment is on a claim

which in fact belongs to the plaintiff, *Boyett* v. *Potter* (1886) 80 Ala. 476; semble, *State* v. *St. Johnsbury* (1887) 59 Vt. 332, but many jurisdictions are contra which deny a recovery when the defendant claimed in his own right. *Patrick* v. *Metcalf* (1867) 37 N. Y. 332; *Nolan* v. *Manton* (1884) 46 N. J. L. 231. Such decisions are attributable largely to the mistaken idea that actual assent is necessary, *Sergeant* v. *Stryker* (N. J. 1838) 1 Harr. 464, or that the relationship of principal and agent is fundamental, Keener, Quasi-Contracts, 167, or that the payment must have discharged the debt. *Patrick* v. *Metcalf, supra.* It is certainly anomalous for courts to admit that recovery in such cases would be in every sense conformable to natural justice, *Butterworth* v. *Gould* (1869) 41 N. Y. 450; *Sergeant* v. *Stryker, supra,* and then deny a remedy based thereon.

In a recent case the defendant by means of a non-negotiable order, drawn but never delivered, by the plaintiff, wrongfully procured the transfer to her account of the plaintiff's deposit in a savings bank. A recovery was properly denied. *Earle* v. *Whiting* (Mass. 1907) 82 N. E. 32. As shown by the foregoing principles, the assumption of the court that the action would lie had the plaintiff drawn out the money, was correct, whether, according to the by-laws of the bank, see *Levy* v. *Franklin Sav. Bank* (1875) 117 Mass. 448, the payment would or would not have discharged the bank's obligation to the plaintiff. But the defendant received nothing but a bare credit, against which the bank had a perfect defense. *Commonwealth* v. *Scituate Sav. Bank* (1884) 137 Mass. 301. Though recovery may be had where the defendant has received a credit on account, *Houser* v. *McGuinas* (1891) 108 N. C. 631, it proceeds upon the ground that some debt against the defendant has to that extent been cancelled, so that he has received "money's worth." *Danworth* v. *Dewey* (1824) 3 N. H. 79. In the principal case, therefore, the plaintiff failed in an essential element in his cause of action.

PRESUMPTIONS OF LAW AS EVIDENCE.—It is maintained by some writers, Thayer, Prel. Treat. Evid. 563, 575; 4 Wigmore, Evid. §§ 3529, 3536, and an increasing number of courts, *Vincent* v. *Mutual Life Ass'n* (1904) 77 Conn. 281, that the only effect of a legal presumption as a presumption of law is to throw on the party against whom it operates the burden of going forward with the evidence. Under this view three elements may be present: first, the presumption, as such, requiring a decision in the proponent's favor in the absence of "some evidence to the contrary;" second, the logical inference arising from the facts upon which the presumption is based; third, a rule of substantive law accompanying, but not part of, the stronger presumptions, demanding a certain kind of evidence or degree of proof. It being theoretically for the judge to determine when enough "evidence to the contrary" has been established to cause the presumption as such to disappear, Wigmore Evid., *supra,* an exact application of the theory would require a charge stating what facts and combinations of facts—with due regard to the degrees of belief in the minds of the jury—would satisfy the judge's mind of such evidence. This is of course impracticable since a concise charge is necessary, and the spirit of the theory is complied with by simply emphasizing the disappearance of the presumption as such in the presence of some evidence to the contrary. While this theory seems